ORIGINAL

Supreme Court, U.S.
FILED
MAR 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-6484

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

KENNETH GRANVIEL,

Petitioner,

v.

**JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,**

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

WILLIAM C. ZAPALAC*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

* Counsel of Record

QUESTIONS PRESENTED

I. MAY THE STATE CONSTITUTIONALLY DEPRIVE AN ACCUSED OF THE OPPORTUNITY TO PRESENT MITIGATING EVIDENCE REBUTTING THE STATE'S ARGUMENT THAT THE DEATH PENALTY IS A DETERRENT TO CRIME IN ORDER TO CONVINCE THE JURY THAT THE DEATH PENALTY IS NOT APPROPRIATE AS APPLIED TO THIS PARTICULAR ACCUSED?

II. MAY THE PRESUMPTION OF CORRECTNESS BE APPLIED TO A TRIAL COURT'S DECISION TO EXCUSE A POTENTIAL JUROR IN ORDER TO AVOID AN INDEPENDENT ANALYSIS BY THE COURT OF APPEALS WHEN AN IMPROPER STANDARD HAS BEEN APPLIED BY THE TRIAL COURT?

III. MAY THE STATE REQUIRE AN INDIGENT DEFENDANT TO GIVE A COPY OF A PSYCHIATRIC EXAMINATION BUT NOT A NON-INDIGENT IN ORDER TO GET THE COURT-APPOINTED PSYCHIATRIST PAID FOR HIS SERVICES?

IV. MAY THE STATE CONSTITUTIONALLY ADMIT THE TESTIMONY OF THE SUPERVISING BAILIFFS REGARDING ACTIONS THEY OBSERVED BETWEEN DEFENSE ATTORNEYS AND CLIENT DURING PRIVATE CONSULTATIONS?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	13
REASONS FOR DENYING THE WRIT	14
I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.	14
II. THE STATE MAY PROPERLY EXCLUDE AS IRRELEVANT EVIDENCE THAT THE DEATH PENALTY IS NOT A DETERRENT TO CRIME.	15
III. THE COURT BELOW EMPLOYED THE CORRECT STANDARD IN CONCLUDING THAT VENIREMAN CURRY WAS PROPERLY EXCLUDED FOR CAUSE FROM GRANVIEL'S JURY.	17
IV. THE TEXAS PROCEDURE REQUIRING THAT MENTAL HEALTH EXPERTS APPOINTED BY THE COURT AT THE REQUEST OF AN INDIGENT DEFENDANT BE DISINTERESTED EXPERTS WHOSE REPORTS ARE AVAILABLE TO BOTH THE DEFENDANT AND THE STATE DID NOT VIOLATE DUE PROCESS.	21
V. GRANVIEL'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN TWO COURT BAILIFFS WERE PERMITTED TO TESTIFY AT THE PUNISHMENT PHASE OF THE TRIAL ABOUT INCIDENTS OF VIOLENCE ON GRANVIEL'S PART THAT THEY WITNESSED DURING CONFERENCES WITH HIS ATTORNEYS.	25
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	Page
Adams v. Texas, 448 U.S. 38 (1980)	13,18
Ake v. Oklahoma, 470 U.S. 68 (1985)	22,24
Brock v. McCotter, 781 F.2d 1152 (5th Cir.), **cert. denied**, 467 U.S. 1153 (1986)	17
Coker v. Georgia, 433 U.S. 584 (1977)	16
Fisher v. United States, 425 U.S. 391 (1976)	28
Furman v. Georgia, 408 U.S. 238 (1972)	15,16
Goodman v. Lukens Steel Co., ___ U.S. ___, 107 S.Ct. 2617 (1987)	18
Gregg v. Georgia, 428 U.S. 153 (1976)	17
Jackson v. Beto, 388 F.2d 409 (5th Cir. 1968)	27,28
Jackson v. Denno, 378 U.S. 368 (1964)	11
Lockett v. Ohio, 438 U.S. 586 (1978)	15,16,17
Patton v. Yount, 467 U.S. 1025 (1984)	19
Turner v. Louisiana, 379 U.S. 466 (1965)	27,28
United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)	18
Wainwright v. Witt, 469 U.S. 454 (1985)	13,18,19
Wells v. Rushing, 755 F.2d 376 (5th Cir. 1985)	28
Witherspoon v. Illinois, 391 U.S. 510 (1968)	18
Woodson v. North Carolina, 428 U.S. 280 (1976)	16

Constitutions, Statutes and Rules

U. S. Const., amend. V	2
U. S. Const., amend. VI	2

TABLE OF AUTHORITIES, CONTINUED

Constitutions, Statutes and Rules	Page
U. S. Const., amend. VIII	15,16
U. S. Const., amend. XIV	2,16,22
28 U.S.C. § 1257	2
28 U.S.C. § 2254(d)	13,19
Tex. Code Crim. Proc. Ann. art. 26.05(a)	23
Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1990)	2
Tex. Code Crim. Proc. art. 46.02 §3(d)	2
Tex. Code Crim. Proc. art. 46.03	21,23
Tex. Penal Code Ann. §1.02 (Vernon 1974)	16,17
Sup. Ct. R. 17	14

NO. 89-6484

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

KENNETH GRANVIEL,

Petitioner,

v.

**JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,**

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division, Respondent herein,[1] by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

[1]For clarity, Petitioner is referred to as "Granviel," and Respondent is referred to as "the state."

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit affirmed the denial of habeas corpus relief on August 28, 1989. **Granviel v. Lynaugh,** 881 F.2d 185 (5th Cir. 1989). Rehearing was denied on September 28, 1989.

JURISDICTION

Granviel seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Granviel bases his claims upon the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Also implicated is Article 46.02 §3(d) of the Texas Code of Criminal Procedure.

STATEMENT OF THE CASE

The state has lawful custody of Granviel pursuant to a judgment and sentence of the 213th District Court of Tarrant County, Texas, in Cause No. 193760R, styled **The State of Texas v. Kenneth Granviel.** On July 2, 1982, Granviel was indicted for the offense of capital murder of Natasha McClendon, while in the course of committing and attempting to commit the offense of aggravated rape, to which he entered a plea of not guilty.

Granviel was found competent to stand trial by a jury on February 22, 1983. Jury selection began on March 14, 1983, and trial began on April 26, 1983. On May 5, 1983, the jury found Granviel guilty of the capital offense. After a punishment hearing, the jury answered affirmatively the special issues submitted and he was sentenced to death pursuant to Tex. Code

Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1990). Granviel appealed to the Court of Criminal Appeals of Texas, which affirmed on July 2, 1986. **Granviel v. State,** 723 S.W.2d 141 (Tex. Crim. App. 1986).

The trial court delayed until March 27, 1987, before scheduling Granviel's execution for May 27, 1987. On May 12, 1987, Granviel filed an application for writ of habeas corpus in the state trial court. On May 21, the court conducted an evidentiary hearing on his claim that he was presently insane and incompetent to be executed. After the hearing, the court made findings of fact and conclusions of law and recommended that relief be denied.

On May 20, 1987, Granviel filed a petition for writ of certiorari. The Court granted a stay of execution pending disposition of the petition. On October 5, 1987, the Court denied the petition. **Granviel v. Texas,** 484 U.S. 872 (1987).

Because Granviel's petition for writ of certiorari was pending in this Court when his state writ application came before the Texas Court of Criminal Appeals, that court took no action on the application. After the petition for writ of certiorari was denied, the trial court rescheduled Granviel's execution for December 10, 1987. On December 4, 1987, Granviel filed a motion to have the Court of Criminal Appeals reinstate his application. On the same day, the court reinstated the application, denied relief, and denied a stay of execution.

On December 7, 1987, Granviel filed a petition for writ of habeas corpus and application for stay of execution in the United

States District Court for the Northern District of Texas, Fort Worth Division. The court granted a stay of execution on December 8, 1987. The United States magistrate to whom the case was assigned, after holding an evidentiary hearing, issued his Findings, Conclusions, and Recommendation, recommending that relief be denied. The district court thereafter denied relief and dismissed the petition. The Court of Appeals for the Fifth Circuit affirmed on August 28, 1989, **Granviel v. Lynaugh,** 881 F.2d 185 (5th Cir. 1989), and denied rehearing on September 28, 1989.

STATEMENT OF FACTS

Laura McClendon and her son, Steven, and Martha McClendon and her daughter, Natasha, lived in apartment number 1234 in the Riverside Village Apartments in Fort Worth, Tarrant County, Texas (SF 38: 65-66, 113).[2] On October 8, 1974, Laura, Martha, Steven, Natasha, and Linda McClendon, Laura's and Martha's cousin, were found murdered in the apartment (SF 38: 78-80). The bodies of Laura, Martha, and Linda were partially nude when found (SX 2,4,5,19).

An autopsy on Laura McClendon revealed that she had been stabbed a total of seven times in the chest, back, and legs. Her mouth was extended, indicating there had been a gag-like material

---

[2]"SF" refers to the statement of facts from Granviel's trial, followed by the volume and page numbers. "SX" refers to the state's exhibits offered at the trial, followed by the exhibit number.

in her mouth. There was also a superficial abrasion of the neck, which was consistent with that which would be made by a ligature. A vaginal smear revealed the presence of spermatazoa, indicating that there had been sexual intercourse and ejaculation within several hours prior to her death (SF 40: 563-67; SX 103).

An autopsy on Martha McClendon revealed that she had suffered a total of fifteen stab wounds to the chest, abdomen, back, and legs. One of the wounds severed the heart, causing massive bleeding into the pericardial sac. Her mouth was also enlarged, indicating there had been gag-like material in her mouth (SF 40: 560-63; SX 102).

The autopsy on Linda McClendon revealed a total of twenty-two stab wounds, nineteen of which were in a relatively small area of the upper chest. Each of those nineteen wounds penetrated deeply into the chest cavity. There were two superficial wounds on the abdomen and a laceration approximately one-half inch long on the left labium of the vagina. There was what appeared to be a ligature impression around the neck and a fracture of some of the structures of the larynx and voice box, indicating strangulation (SF 40: 556-60; SX 101).

Steven McClendon's autopsy revealed that he had been stabbed a total of five times in the chest. Two of the wounds penetrated the heart, causing massive bleeding into the pericardial sac. Two other wounds penetrated part of the liver (SF 40: 552-56; SX 100).

The autopsy performed on Natasha McClendon revealed nine stab wounds to the chest and back. One of the wounds was above

her right clavicle and penetrated her chest cavity, severing all major arteries underneath and causing massive bleeding into the chest cavity (SF 40: 546-55; SX 99).

In each case the cause of death was the stab wounds, which were consistent with being inflicted with a knife. There was also evidence of strangulation as a contributing cause in some of the deaths (SF 40: 568-69).

On February 8, 1975, Kenneth Granviel turned himself in to the police and confessed to killing the McClendons at the Riverside Village Apartments (SF 40: 582, 588; SF 41: 683-91). Granviel gave a written statement to the police, detailing the events of the evening of October 7, 1974 (SX 104). According to that statement, Granviel had driven to the McClendon's apartment and had seen Laura McClendon through the window. He went to the apartment, knocked on the door, and was invited in (SF 41: 685). Soon after entering the apartment, Granviel went into the kitchen where Laura was, took a knife out of his pocket, and put it to her throat (SF 41: 686). He took Laura and two-year-old Steven, who was also in the kitchen, to the front bedroom, locking the apartment door and closing the curtains on the way (SF 41: 686). He had Laura tie Steven up with a telephone cord and then tied and gagged Laura with strips of a sheet from her bed (SF 41: 686-87).

At about that time, Martha, Linda, and Natasha entered the apartment. Linda came into the bedroom and Granviel showed her the knife and told her to lie down on the bed next to Laura (SF 41: 687). He then went to the living room where Martha was, put

the knife to her throat, and took her to the back bedroom, where he tied her up with strips of sheets (SF 41: 687-88). Granviel then dragged Martha to the front bedroom and finally tied up Natasha as well (SF 41: 688).

After moving his car away from the apartment, Granviel returned to the apartment and dragged Laura to the back bedroom. He pulled her pants down to her ankles and began to cut her panties off with his knife. The knife slipped and he cut the inside of her thigh. Granviel eventually raped Laura (SF 41: 688-89).

Steven began crying at this point, so Granviel returned to the front bedroom and stabbed him several times. While Granviel was stabbing Steven, the handle of the knife broke off. Granviel removed the blade from Steven's body and threw it in the kitchen sink. He threw the handle in a trash can and got another knife from the kitchen (SF 41: 689).

Soon thereafter, Granviel took Martha to the back bedroom and laid her across the bed. He undressed her but she would not spread her legs, so he cut her with the knife. He then raped her (SF 41: 689).

Granviel returned to the front bedroom to get Linda. He had tied something around her neck, however, and she was not breathing (SF 41: 689-90). Granviel then stabbed Linda numerous times. Natasha, who was on the floor in the front bedroom, started screaming, so Granviel kicked her and then stabbed her (SF 41: 690).

Next, Granviel returned to the back bedroom and, after talking to Laura for a time, stabbed Martha several times (SF 41: 690). He then stabbed Laura in the back and chest. He asked her if she was dead and, when she answered no, he stabbed her several more times (SF 41: 690). Finally, Granviel went through the women's purses, took their money, and left the apartment (SF 41: 690-91).

After completing his statement, Granviel confessed to two other killings and several rapes that he had committed earlier in the evening of February 8, 1975, prior to turning himself in. Granviel had mentioned the murders when he first arrived at the police station and, as a result, he and several officers went to his apartment at 1802 Roberts in Fort Worth (SF 41: 707). Granviel directed the police to the apartment and gave them a key to get in (SF 41: 707). Two detectives entered the apartments and found the bodies of two females -- Betty Williams and Vera Hill (SF 41: 707, 740). In a written statement (SX 107), Granviel gave police a detailed account of the events of the evening of February 8, 1975.

Granviel had been at his home watching television when Betty Williams knocked on the door. He let her in and Williams used the phone to make several calls. She asked if Granviel had a pack of cigarettes that belonged to a friend of theirs, and Granviel threw her a half a pack he had in his pocket (SF 41: 716). As Williams got up to leave, Granviel suggested that she get a whole pack of cigarettes out of a dresser drawer in his bedroom. He followed her into the bedroom, grabbed her from

behind, and "turned her on her head" (SF 41: 716). He removed her pants but then heard Vera Hill, his common-law wife, unlocking the front door (SF 41: 717, 751). Granviel then got a knife from the kitchen and stabbed Hill in the chest, back, and stomach once she was in the apartment (SF 41: 717).

He returned to the bedroom and was about to rape Williams when he was interrupted by a knock at the door. He got rid of the visitor and then dragged Hill's body into the kitchen (SF 41: 717). He went back to bedroom and this time raped Williams. When someone again knocked on the door, he tried to keep Williams quiet by "wrapping her chin and neck around the bedpost." He then stabbed Williams repeatedly in the side, chest, and back (SF 41: 717-18). Later, as Granviel was changing clothes, Williams was still alive and making noises. He went to the kitchen and got a claw hammer and hit Williams twice on the right side of the head and temple (SF 41: 718).

After this, Granviel left the apartment and drove around for awhile. He eventually ended up at Wanda Hanson's house (SF 41: 718-19). He knocked on the door and asked Lizzie Phillips, Wanda's mother, if Wanda still lived there and was home (SF 41: 719; SF 43 1076). When Phillips told him that Wanda was not home, Granviel asked to use the phone. Phillips let him in but, instead of making a call, Granviel pulled a knife on her (SF 41: 719; SF 43: 1077-78). He told Phillips not to say anything and he would not hurt her (SF 43: 1078). Granviel then took Phillips and her two grandchildren to the bedroom and tied them up (SF 41: 719; SF 43: 1080-81).

Granviel removed Phillips' pants and underwear and began to rape her (SF 41: 720; SF 43: 1081, 1084). Before he finished, however, someone knocked on the front door. He got a gun which belonged to Phillips and went to answer the door. He let Janet Craney, Wanda's sister, in, put the gun to the back of her head and took her to the bedroom where Phillips and the two children were (SF 41: 720; SF 43: 1084-86). He then put Craney and the two children in the bathroom. He returned to the bedroom and raped Phillips, then took her to the living room and continued to have sexual intercourse with her (SF 41: 720; SF 43: 1088-90).

Soon, there was another knock at the door. Granviel opened the door and let Dwight Craney, Janet's husband, into the apartment. He put the gun to the back of Craney's head and then put him in a closet (SF 41: 720; SF 43: 1090-91). Granviel then took Phillips back to the bedroom (SF 41: 720-21; SF 43: 1091).

About that time, Wanda came home and entered the apartment. Granviel put his pants on and waited for her to come down the hall (SF 41: 721; SF 43: 1093). As she passed where he was standing he grabbed her and pointed the gun at a man who had come in with her (SF 41: 721; SF 43: 1093). He eventually left the house, taking Wanda with him, and returned to his apartment (SF 41: 721; SF 43: 1098). Granviel then raped Wanda (SF 41: 722).

Later that evening, Granviel called his pastor, Reverend Spearman, and asked him to with Granviel to the police station (SF 41: 723; SF 40: 582). Granviel took Wanda to pick up Reverend Spearman and then drove to the police station. He told Wanda to drive his car and give it to a friend (SF 40: 585). At the

police station, Granviel gave two written statements, confessing to a total of seven murders and five rapes. As a result of these confessions, Granviel was indicted on one count of capital murder and a second count of murder.

At trial, the court conducted a **Jackson v. Denno**[3] hearing outside the presence of the jury and concluded that the confessions were freely, voluntarily, intelligently, and knowingly given and were therefore admissible into evidence (SF 40: 527).

Granviel's defense was based on a claim that he was legally insane at the time he committed the offenses. In support of the plea, the defense presented the testimony of a psychologist and a psychiatrist who, based on interviews with Granviel or hypothetical questions, concluded that at the time of the murders, Granviel was probably suffering from paranoid schizophrenia that prevented him from conforming his conduct to the requirements of the law (SF 42: 879-915; SF 43: 959-991; SF 44: 1261-78; SF 45: 1360-76). The defense also presented testimony concerning Granviel's youth. His mother, Willie Lee Jones, testified that Granviel set fires in their house three times when he was a child, the third fire resulting in nearly total destruction of the inside of their home (SF 41: 807-10). There was also testimony that at one time Granviel had tried to sexually molest his younger brother (SF 42: 851). Mrs. Jones also testified that

[3]378 U.S. 368 (1964).

when he was sixteen, Granviel assaulted her and tried to rape her. As a result of that incident, Granviel was sent to the state reform school at Gatesville (SF 41: 823-33).

In response to this evidence, the state presented the testimony of two psychiatrists who, based either on interviews with Granviel or hypothetical questions, concluded Granviel was not suffering from a major mental illness, but instead had an antisocial personality. Both concluded that Granviel knew right from wrong and could conform his behavior to the requirements of the law (SF 43: 1114-1124; 1124-1149; 44: 1218-1247). The jury found that Granviel was sane at the time of the offense for which he was indicted, and that he was guilty of capital murder as charged in the indictment.

At the punishment phase of the trial, the jury considered all the evidence set forth during the guilt-innocence stage of the trial. The jury also heard testimony concerning Granviel's behavior while in jail, which was generally favorable to the defendant (SF 46: 1629-1671). The state presented testimony concerning two incidents, one where Granviel slapped one of his defense attorneys and one where Granviel reached through cell bars and grabbed his other defense attorney by the tie (SF 46: 1609-1629). The jury answered the two special punishment issues affirmatively, and Granviel was sentenced to death.

SUMMARY OF ARGUMENT

The petition presents no special or important reasons for the Court to exercise its certiorari jurisdiction.

The court below correctly held that there was no constitutional violation in the trial court's exclusion of testimony that the death penalty does not deter crime. Such evidence is not an aspect of the defendant's character or background, or a circumstance of the offense demonstrating a reduced personal culpability. Thus a trial court may properly preclude the defendant from introducing or the sentencer from considering such evidence.

The court of appeals was correct in employing the test set out in **Adams v. Texas** and **Wainwright v. Witt** in determining whether venire members were properly excluded for cause due to their beliefs about capital punishment. Appellate courts are to apply the law as it exists at the time the case comes before it. Here, venireman Curry demonstrated by his answers to **voir dire** questions that serving on the jury would put in such a dilemma that the trial court was justified in concluding that he would be unable to faithfully carry out his duties as a juror. The court below accorded this finding the presumption of correctness required by 28 U.S.C. §2254(d).

Granviel was not denied due process when the trial court appointed the psychiatrist who had examined Granviel at his attorneys' request as a disinterested expert and made his report available to the state. Granviel had the services of both a psychologist and a psychiatrist who examined him before his

second trial and testified that in their opinion he was suffering from paranoid schizophrenia and was insane at the time of the offense. The fact that the state had access to a contrary conclusion from a psychiatrist who examined Granviel at his request did not prevent Granviel from investigating and presenting his insanity defense.

There was neither a due process violation nor a violation of the attorney-client privilege when two court bailiffs were allowed to testify at the punishment phase about two incidents of violence they had observed while Granviel was meeting with his attorneys. There was no showing that the bailiffs had the kind of close and continual association with the jury that would render their testimony inadmissible, and their testimony in any event could not have had a significant impact on the jury. It was formal and factual and was cumulative of other, much more serious, evidence of Granviel's violent nature. In addition, the incidents did not occur during privileged communications made for the purpose of obtaining legal advice, and did not reveal the content of any communication between Granviel and his attorneys. Thus, there was no breach of the attorney-client privilege.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of

judicial discretion, and will be granted only when there are special and important reasons therefor. Granviel has advanced no special or important reason in this case, and none exists. His claims involve only the application of settled principles of law to undisputed fact situations, so there is no important question of law to be resolved.

II.

THE STATE MAY PROPERLY EXCLUDE AS IRRELEVANT EVIDENCE THAT THE DEATH PENALTY IS NOT A DETERRENT TO CRIME.

During the punishment phase of his trial, Granviel attempted to introduce testimony from a doctoral candidate in sociology that the first post-**Furman**[4] execution in Texas had had no deterrent effect on the crime rate.[5] After hearing the testimony outside the presence of the jury, the trial court ruled that it was irrelevant and refused to admit it. Granviel contends that the testimony was mitigating evidence that he had a right to present to the jury and that its exclusion was error under the Eighth Amendment.

Granviel premises his argument on the principle that a sentence is unconstitutionally disproportionate "'if it . . . makes no measurable contribution to acceptable goals of punishment . . . .'" **Lockett v. Ohio,** 438 U.S. 586, 624 (1978)

---

[4]**Furman v. Georgia,** 408 U.S. 238 (1972).

[5]The first execution in Texas after **Furman** took place on December 7, 1982. Granviel's second trial was in April and May, 1983.

(White, J., concurring in part and dissenting in part), quoting **Coker v. Georgia,** 433 U.S. 584, 592 (1977). He then notes that one of the stated purposes of the punishments prescribed by the Texas Penal Code is to deter crime. Tex. Penal Code Ann. §1.02 (Vernon 1974). Thus, he concludes, evidence that the death penalty is not a deterrent is relevant to the jury's sentencing decision and cannot be excluded from its consideration.

Granviel's contention misconstrues this Court's holdings regarding the nature of mitigating evidence at the sentencing phase of a capital murder trial. In **Furman v. Georgia,** 408 U.S. 238 (1972), the Court held that the death penalty, as then applied, was violative of the Eighth and Fourteenth Amendments because it was imposed without sufficient guidance to the sentencing authority. Four years later, North Carolina's mandatory death penalty statute was found to be invalid because it did not permit the sentencer to consider the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the death penalty." **Woodson v. North Carolina,** 428 U.S. 280, 303 (1976). The Court has since held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, **as a mitigating factor,** any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." **Lockett v. Ohio,** 438 U.S. at 604 (emphasis in original) (footnote omitted). The holding recognized that the punishment

hearing must focus the sentencer's attention on the defendant before it and the nature of the particular crime for which the death sentence is being sought.

The Court went on to note that trial courts were not limited in their traditional authority to exclude "evidence not bearing on the defendant's character, prior record, or the circumstances of the crime." **Id.** at 604 n.12; **see also Brock v. McCotter,** 781 F.2d 1152, 1158 (5th Cir.) ("where no reasonable person would view a particular fact as mitigating it may properly be excluded as irrelevant."), **cert. denied,** 467 U.S. 1153 (1986). As the court below held, whether capital punishment has value as a deterrent to crime is simply "irrelevant to the defendant or his crime," **Granviel v. Lynaugh,** 881 F.2d at 189, and the exclusion of the evidence is not constitutional error.[6]

III.

THE COURT BELOW EMPLOYED THE CORRECT STANDARD IN CONCLUDING THAT VENIREMAN CURRY WAS PROPERLY EXCLUDED FOR CAUSE FROM GRANVIEL'S JURY.

At trial, the state successfully challenged venire member Edgar Lincoln Curry for cause on the ground that his views on capital punishment prevented him from taking the juror's oath to

[6]Moreover, Granviel does not deny that another "acceptable goal of punishment" is retribution. **Gregg v. Georgia,** 428 U.S. 153, 183-87 (1976); Tex. Penal Code Ann. §1.02 (3) (one of the objectives of the Code is "to prescribe penalties that are proportionate to the seriousness of offenses"). It cannot be gainsaid that the death penalty in this case makes a measureable contribution to the retributive aspect of punishment and, thus, its imposition is not constitutionally disproportionate.

answer the punishment issues based on the evidence presented. The court below reviewed the trial court's action under **Wainwright v. Witt,** 469 U.S. 454 (1985), and **Adams v. Texas,** 448 U.S. 38 (1980), and affirmed. Granviel contends that both the district court and the court of appeals employed an incorrect standard of review because **Witherspoon v. Illinois,** 391 U.S. 510 (1968), was the standard in effect at the time of his trial, and was the standard under which the trial court was operating. Granviel asserts that Curry's responses to **voir dire** questions did not show that he would automatically vote in such a way that a death sentence would not be imposed and that, therefore, under **Witherspoon,** he should not have been excluded for cause.

It is fundamental in the nature of appellate review that courts apply the law as it exists at the time the case comes before them. **Goodman v. Lukens Steel Co.,** ___ U.S. ___, ___, 107 S.Ct. 2617, 1621 (1987); **United States v. Schooner Peggy,** 5 U.S. (1 Cranch) 103, 110 (1801). Accordingly, it was proper for the lower courts to apply to Granviel's case the standard in **Adams,** which was reaffirmed in **Witt** as the correct test for judging the qualification of a venire member with conscientious objections to the death penalty.

Under the **Adams/Witt** standard, the question to be decided is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" **Witt,** 469 U.S. at 424, quoting **Adams v. Texas,** 448 U.S. at 45. This formulation of the rule dispenses with **Witherspoon's** test of "automatic decision making"

and does not require that the juror's bias be proven with "unmistakable clarity." **Witt**, 469 U.S. at 424. In fashioning this rule, the Court went on to observe:

> What common sense should have realized experience has proven; many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear," these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

Id. at 424-26 (footnote omitted).

Thus, the Court held that the trial court's determination that a person was not qualified to serve on the jury is a factual finding, entitled to a presumption of correctness under 28 U.S.C. § 2254 in federal habeas corpus proceedings. **Id.** at 429; **see also Patton v. Yount**, 467 U.S. 1025 (1984). This kind of determination is made after **voir dire** examination, during which the trial court has the opportunity to observe the demeanor and hear the responses of the venire member. A finding that the prospective juror is biased rests on the court's assessment of credibility "whose basis cannot be easily discerned from an appellate record." **Witt**, 469 U.S. at 429.

Here, the court below noted that Curry gave facially inconsistent answers to the questions put to him during **voir dire**. He stated initially that he was opposed to the death penalty (SF 16: 852-53), and that he would vote automatically

against the death penalty regardless of what the evidence showed (SF 16: 854). He later retreated from this position and said that if he took the juror's oath he would answer the punishment issues truthfully because he believed strongly in the solemnity of an oath (SF 16: 862). However, because taking the oath would force him to compromise his beliefs, he stated that he would not take the oath (SF 16: 865, 867).

He gave the same kind of responses during questioning by Granviel's attorney, stating that he would not take the juror's oath because to do so could force him to set aside his personal convictions and "I'm not going to set them aside irregardless" (SF 16: 885), while acknowledging that if he took the oath he would answer the punishment issues truthfully (SF 16: 887-88). The trial court eventually took over the questioning, which culminated with the following:

> Q. The question, then, becomes if you were serving on a jury which were to determine those questions and that matter --
>
> A. Uh-huh.
>
> Q. --all I need to know at this point is how strong is that feeling, Reverend? Would you always vote against death or are there circumstances under which you could vote for it if the evidence shows you you should?
>
> A. Irregardless I will not change my position, that I will not want to be in a position to have to decide whether a man would live or die.
>
> Q. All right.
>
> A. And I would vote that he live irregardless to whether the evidence was presented.
>
> Q. Every time?

A. Every time.

(SF 16: 892-93). At this point, the court sustained the state's challenge for cause.

As the court of appeals observed, Curry's beliefs put him on the horns of a serious dilemma. On the one hand, he was morally opposed to capital punishment, and felt that he could not even take part in the process of sentencing someone to death and still be true to his principles; on the other, he felt just as strongly that if he took an oath to do something, he was morally bound to follow it. Although he professed to be able to abide by the terms of the juror's oath, the trial court, hearing his answers and observing his demeanor, certainly was "left with the definite impression that he would not be able to faithfully and impartially apply the law," so that the state's challenge for cause was properly granted. **Granviel v. Lynaugh,** 881 F.2d at 188.

IV.

THE TEXAS PROCEDURE REQUIRING THAT MENTAL HEALTH EXPERTS APPOINTED BY THE COURT AT THE REQUEST OF AN INDIGENT DEFENDANT BE DISINTERESTED EXPERTS WHOSE REPORTS ARE AVAILABLE TO BOTH THE DEFENDANT AND THE STATE DID NOT VIOLATE DUE PROCESS.

Prior to his first trial, Granviel's attorneys arranged for Dr. John Holbrook, a psychiatrist, to examine Granviel for sanity at the time of the offense. After the doctor completed his examinations, Granviel moved to have him appointed by the court so that he could be reimbursed. The trial court entered an order pursuant to Tex. Code Crim. Proc. Ann. art. 46.03, appointing Dr.

Holbrook as a disinterested expert for the court. A copy of his report was given to both the prosecutor and the defense, over Granviel's objection. At trial, Dr. Holbrook testified that, in his opinion, Granviel had been sane at the time he committed the offense. Dr. Holbrook died prior to Granviel's second trial and the state introduced his testimony from the first trial, again over Granviel's objection. Granviel asserts that requiring the psychiatrist appointed at his request to turn over his report to the state violated his right to due process.

In **Ake v. Oklahoma,** 470 U.S. 68 (1985), the Court held that the Fourteenth Amendment requires the state to provide an indigent defendant access to a psychiatrist's assistance when he has made a preliminary showing that his sanity at the time he committed the crime is likely to be a significant factor at trial. The Court took note of the fact that a defendant's mental condition is relevant to the question of his criminal culpability and that, when the defendant raises the question of his sanity, a psychiatrist's knowledge and skill "may well be crucial to the defendant's ability to marshal his defense." **Id.** at 80. Consequently, to ensure a fair and accurate outcome of the criminal proceedings, the state must "assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." **Id.** at 83.

Texas law provides that an attorney appointed to represent an indigent defendant shall be reimbursed for reasonable expenses incurred in using expert witnesses, if prior approval is obtained

from the court. Tex. Code Crim. Proc. Ann. art. 26.05(a). Article 46.03 §3(a) of the Code of Criminal Procedure provides that, when notice of intent to raise an insanity defense is given, the court, on its own motion or that of the defendant or his attorney, may appoint a disinterested expert to examine the defendant and testify at trial. His report is to be delivered to the court, which shall furnish copies to the attorneys for both the defense and the state. In this case, Granviel's attorneys had already had Granviel examined when they sought to have Dr. Holbrook appointed (SF 43: 1029-30). Because there had been no prior request for the appointment, the trial court acted under article 46.03 in designating Dr. Holbrook as a disinterested expert.[7]

Granviel can show no violation of his rights by this procedure for the simple reason that he had access to both a psychologist and a psychiatrist to assist him in preparing his insanity defense at his second trial. Dr. Jerold May, PhD, examined Granviel at Dr. Holbrook's request before the first trial. Based on his interviews and the results of a battery of psychological

---

[7]Granviel's attorney at his first trial, who had been elected a state district court judge by the time of the second trial, testified that Article 26.05 was available at the time he contacted Dr. Holbrook (SF 43: 1030, 1036-38, 1042), he did not understand that the statute was limited to paying only investigators, but was available to reimburse any expert (SF 43: 1045), and he could have sought prior approval for paying Dr. Holbrook. Granviel does not contend that counsel was ineffective for proceeding as he did in seeking to have Dr. Holbrook appointed as an expert.

tests, Dr. May concluded that Granviel was insane at the time of the offense. Dr. May discussed his findings with counsel representing Granviel at his second trial (SF 43: 954), and testified at the second trial, explaining in detail the methods he employed and the basis for his diagnosis (SF 42: 879-956).

In addition, Dr. Swen Helge, a psychiatrist, observed Granviel interact with his attorney during an interview in the jail (SF 43: 974-75). He later attempted on two occasions to interview Granviel and conduct a series of tests. The first time Granviel refused to see him, and the second he spoke in a "sort of word salad manner," "with words that had some meaning but they weren't associated properly or put together properly" (SF 43: 975-76). Based on his observations and on a hypothetical question put to him by Granviel's attorney, Dr. Helge testified that in his opinion Granviel suffered from a paranoid schizophrenic personality and was legally insane when he committed the crime (SF 43: 990-91). Thus, Granviel had the services of not one but two experts who "conduct[ed] an appropriate examination and assist[ed] in evaluation, preparation, and presentation of the defense." **Ake,** 470 U.S. at 83. The fact that Dr. Holbrook's unfavorable diagnosis was made available to the state placed no limits on Granviel's ability to uncover and present the facts relating to his sanity. Accordingly, there was no due process violation.

V.

GRANVIEL'S DUE PROCESS RIGHTS WERE NOT VIOLATED WHEN TWO COURT BAILIFFS WERE PERMITTED TO TESTIFY AT THE PUNISHMENT PHASE OF THE TRIAL ABOUT INCIDENTS OF VIOLENCE ON GRANVIEL'S PART THAT THEY WITNESSED DURING CONFERENCES WITH HIS ATTORNEYS.

During the punishment phase, the trial court conducted a hearing outside the presence of the jury to determine whether Basil Honeycutt, one of the court's bailiffs, was competent to testify concerning an incident involving Granviel that occurred in the court's holdover cell during a pretrial hearing (SF 46: 1609-1617). Honeycutt testified that he was employed as a bailiff assigned to the 213th District Court and had been "attending" the jury during the course of the trial (SF 46: 1611).[8] Honeycutt testified that in February of 1983 he witnessed Granviel slap his court-appointed attorney in the face while standing in the holdover cell of the courtroom (SF 46: 1610). He further testified that he never discussed the incident with any member of the jury (SF 46: 1612). Defense counsel asked the court to exclude the testimony asserting: 1) that Honeycutt should be considered an incompetent witness since he had the opportunity to gain the confidence of the members of the jury during his service as bailiff; and 2) that "the court had been informed of the 'alleged occurrence' [only] for the benefit of

[8]He described his duties as taking the sequestered jurors to breakfast and lunch, getting the jurors to the hotel, and making sure the jurors were where they were supposed to be at the appropriate time (SF 46: 1611-12).

the information of the court" (SF 46: 1615). The Court overruled counsel's objections and Honeycutt testified to the same facts before the jury (SF 46: 1617-1620). On cross-examination, Honeycutt testified that Granviel had been a model prisoner and that he had never tried to escape confinement (SF 46: 1620-1621).

Thereafter, the state called Harry Millerd, another bailiff assigned to the court. Defense counsel stated that he wished to raise the same objections as those made to the testimony of Bailiff Honeycutt. The objection was overruled and Millerd testified about an incident he witnessed while looking through a glass window in the door of the holdover room. At some point during a break in the **voir dire**, Granviel reached through the holding room's bars and appearing to be irate, grabbed one of his court-appointed counsel by the tie (SF 46: 1627-11628). Defense counsel's cross-examination consisted of questions clarifying Millerd's testimony as to the area of the body which Millerd saw Granviel grab (SF 46: 1628). Later, when Millerd was called as a witness on behalf of Granviel, he testified that he had never witnessed any type of disturbance or violence between Granviel and any other inmate (SF 46: 1639).

Granviel claims the testimony of the bailiffs was improper for two reasons. First, he asserts the testimony was improper because the bailiffs were "cloaked with the credibility of the Court" and it was thus probable that the jury was improperly influenced by their testimony. Second, he contends the testimony

was improper because it invaded the attorney-client privilege. Both allegations are without merit.

To determine whether the testimony of court officers who have had some contact with the jury should be barred, courts must engage in a two-part analysis. First, there must be some type of close and continual association between the testifying officer and the jurors. **See Turner v. Louisiana,** 379 U.S. 466, 474 (1965). Standing alone, however, such close association is not sufficient to bar testimony. The court must also analyze the "impact the officer's testimony may have had on the jury." In measuring this impact, the court should look to the nature of the testimony and, if the testimony was of more than a formal nature, whether it was corroborated or uncontradicted. **Id.** at 473 (emphasizing that the officer's testimony "was not confined to some uncontroverted or merely formal aspect of the case" but involved key testimony to a finding of guilt or innocence); **see also Jackson v. Beto,** 388 F.2d 409, 411 (5th Cir. 1968) (reading the bar on testimony "as limited by situations in which the jury custodian's testimony was central to the development of the case for the prosecution and in which his contact with the jury was continual and intimate").

Assuming there was sufficient contact with the jury to invoke the concerns set forth in **Turner**, admission of the testimony of Bailiffs Honeycutt and Millerd does not call for the granting of habeas relief. First, it is noted that the two men testified only during the punishment phase of the trial, after Granviel had already been found guilty of capital murder.

Moreover, their testimony, which went uncontradicted, was of a rather formal nature in that the bailiffs merely described events they witnessed; the testimony involved neither a subjective evaluation of the evidence nor an evaluation of Granviel's future dangerousness. The testimony, while relevant to the issue of future dangerousness, concerned minor acts of physical violence against individuals, and placed in comparison to the massive amount of evidence indicating Granviel's dangerous tendencies, cannot be considered to have had an unwarranted impact on the jurors. Thus, in overruling defense counsel's objection, the trial judge did not allow the introduction of the type of key testimony, **Turner v. Louisiana,** 379 U.S. at 473, or "testimony. . .central to the development of the case for the prosecution." **Jackson v. Beto,** 388 F.2d at 411.

Granviel's second basis for challenging the testimony of the two bailiffs is that it invaded the attorney-client privilege. As the court below noted, the privilege is limited to "communications 'made in confidence for the purposes of obtaining legal advice.'" **Granviel v. Lynaugh,** 881 F.2d at 193, quoting **Wells v. Rushing,** 755 F.2d 376, 379 n.2 (5th Cir. 1985); **see Fisher v. United States,** 425 U.S. 391, 403, (1976). This case involves no such attorney-client privilege issue. The bailiffs' testimony did not reveal a confidential communication from Granviel to his court-appointed attorneys made "for the purpose of obtaining legal advice." Rather, it concerned actions by Granviel that the bailiffs witnessed and that were relevant to the issues to be determined by the jury at the punishment

hearing. Granviel has made no showing that actions involving the attorney and client, as opposed to communications between them, is included within the scope of the privilege, nor can he. Such an extension of the attorney-client privilege to cover this kind of interactions would extend the protection outside the logic of the principle. The court below properly rejected Granviel's objections to the bailiffs' testimony as meritless.

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Attorney General

MICHAEL P. HODGE
Assistant Attorney General
Chief, Enforcement Division

WILLIAM C. ZAPALAC*
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEYS FOR RESPONDENT

*Counsel of record

THE ATTORNEY GENERAL
OF TEXAS

JIM MATTOX
ATTORNEY GENERAL

March 26, 1990

The Honorable Joseph F. Spaniol, Jr.
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: Kenneth Granviel v. James A. Collins,
No. 89-6484

Dear Mr. Spaniol:

Enclosed for filing with the papers in the above styled cause are the original and nine typewritten copies of Respondent's Brief in Opposition. Also enclosed are the Proof of Service and Appearance of Counsel forms.

Please indicate the date of filing on the enclosed copy of this letter and return it to me in the enclosed postpaid addressed envelope.

By copy of this letter, one copy of said brief has been sent to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

WILLIAM C. ZAPALAC
Assistant Attorney General
(512) 463-2080

WCZ/kh
Enclosures

cc: Danny D. Burns
115 North Henderson St.
Fort Worth, Texas 76102

RECEIVED
MAR 29 1990
OFFICE OF THE CLERK
SUPREME COURT

NO. 89-6484

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

KENNETH GRANVIEL,

Petitioner,

v.

**JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,**

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PROOF OF SERVICE

I hereby certify that on the 26th day of March, 1990, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Danny D. Burns, 115 North Henderson St., Fort Worth, Texas 76102. All parties required to be served have been served. I am a member of the Bar of this Court.

WILLIAM C. ZAPALAC
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE ME this 26th day of March, 1990.

NOTARY PUBLIC, State of Texas

NO. 89-6484

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

KENNETH GRANVIEL,

Petitioner,

v.

**JAMES A. COLLINS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,**

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

APPEARANCE OF COUNSEL

The Clerk will enter my appearance as counsel for James A. Collins who in this Court is Respondent. I certify that I am a member of the bar of the Supreme Court of the United States.

WILLIAM C. ZAPALAC
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEY FOR RESPONDENT